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No. 901

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

BAKERY AND PASTRY DRIVERS AND HELPERS LOCAL 802 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PETER SULLIVAN, individually and as President of the said Union, PADDY SULLIVAN, individually and as an officer of said Union, and HYMAN BERNSTEIN, individually and as business agent of said Union, all of 265 West 14th Street, New York City,

Petitioners,

against

HYMAN WOHL and LOUIS PLATZMAN,

Respondents.

BRIEF FOR RESPONDENTS.

HYMAN WOHL,
LOUIS PLATZMAN,
Respondents in Person.

Of Counsel:
JOSEPH APPEL,
ARTHUR STEINBERG.

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BRIEF FOR RESPONDENTS.

Statement of the Case.

On October 20th, 1941, this Court granted respondents' petition for a rehearing and vacated the judgment of reversal, dated June 2nd, 1941, and recalled its mandate (R. 197).

A. Summary of Testimony

The material facts pertaining to this action are as follows:

The respondent, Wohl had been in business for five years buying baked products from bakers and reselling them at a small profit to grocery stores. At the time picketing commenced, he was purchasing merchandise from four different bakeries, being at liberty at any time to change to any other bakeries; during the past five years he owned a truck which at the time of the trial was registered in his own name (R. 64, 65. 67). His approximate weekly earnings were about $32.00 and he supported an aged mother and two motherless daughters. He did not have enough work for himself and did not require anyone to assist him in his business. He worked about thirty to thirty-five hours a week which hours were spread over a seven day week, two hours of which were worked on Sunday (R. 66, 67). Wohl usually commenced work at about 5:00 A. M. in the morning and completed his first run on his route at 7:00 A. M. Then about 8:00 A. M. he began a second delivery which was completed about 10:30 A. M. Thereafter he was through for the day (R. 81, 82, 84). Previously, the Union had compelled him to hire a relief man one day a week for ten weeks (R. 90) and that he let him go because he was falling behind in his bills and could not pay for this service (R. 92).

On December 14th, 1938, a member of the defendant union gave him a letter signed by the business agent advising him that a member of the Union would come to work in the respondent's place the coming Sunday. The respondent returned this letter advising the Union representative, "I have no work for him and I could not afford to pay him $9.00 for a day's work", whereupon the representative of the Union said, "Well, let us follow him up boys and let us picket his stores."

On December 16th, 1938, the business delegate of the Union spoke to him, accompanied by four others, when he was about to obtain products from one of the bakeries he did business with. Mr. Platzman, the other respondent,

as also present. Respondents were advised, "Why don't ou leave that man work this morning that I sent in." espondent Platzman replied, "I could not afford it, and have no work for myself, and I cannot afford to pay noney out that I don't need, for $9.00 a day * * * What o you want me to do in order for you $9.00, I should tarve?" Whereupon, the business delegate replied, "I lon't care what you do, if you eat or if you don't eat, out the $9.00 must be paid regardless. If you cannot pay he $9.00, take your truck, put it in storage, and get out of business." Platzman replied that he would not do so, whereupon, the business delegate informed the proprietor of Diamond Bakery, one of the bakeries from which the respondents purchased products, "Regardless, I don't want to know, you will have to pay for the day if Platzman don't pay for the day's work" and directed this proprietor not to bake any merchandise for the respondents (R. 70, 71). Wohl was also advised that the same applied to him. The delegate thereupon advised two members of the Union to take signs and follow the respondents and "see to it that in any place he delivers any merchandise to tell the customers that if they accept the merchandise they will picket his store." Wohl thereupon told the delegate, "I cannot afford to pay $9.00, Mr. Bernstein, and I ain't got enough work for myself. I have only got five hours work a day; I have only got maybe two hours work on Sunday." Whereupon, Mr. Bernstein replied, "I don't want to know what happens; $9.00 must be paid for a day's work regardless of when I sent them in" (R. 72).

On January 23rd, 1939, pickets appeared in front of Diamond Bakery. On January 25th, 1939, the Union delegate appeared at another bakery when the respondent Wohl was about to receive merchandise and advised the owner thereof that if any merchandise was sold to the respondents his bakery would be picketed. The respondents nevertheless obtained merchandise and pickets appeared in front of that bakery immediately (R. 72, 75).

On the same day pickets were also present at the Diamond Bakery. No further picketing occurred because at the time the motion for a temporary injunction was argued, counsel for the petitioners stipulated "that the pickets would be withdrawn and the matter remain in *status quo* until the disposition of the case on the trial" (R. 77).

Respondent Platzman was in business for two years. He purchased his merchandise from two bakeries and was under no obligation to continue purchasing from them and was at liberty at any time to change his source for products (R. 100, 101). He worked about sixty-five hours per week and earned about $35.00 per week. On December 15th, 1938, he saw the union delegate who came over to him and told him that he "was sending me a man on the following day, Friday, to work for me" saying that "there was nothing to talk about, he was sending a man in, I will take him on. I told him if he did it it would be a foolish thing. He would only waste his time. He started holding my truck." The following day the same delegate demanded that he hire a man that morning and respondent advised him, "I would not let him work because I could not afford it." The delegate nevertheless told him, "that man would be paid for that day, regardless of whether I let the man work or not, and that I would take a man on every week and pay him for it." Platzman replied, "I could not afford it." The union representative declared, "If you cannot afford it you should put your truck in storage and pack up your business. * * * He did not care whether I starved or not, that $9.00 had to be paid." The delegate thereupon advised the proprietor of the bakery that "he is holding him personally responsible that in the event he baked for me the following time, he would have to pay for every one of the days I would not pay a man for." The delegate then advised respondent Wohl that the same applied to him (R. 102, 103). The delegate also

dvised members of the Union to follow the respondents nd [illegible] into each and every store I (Platzman) deliver merchandise to, and tell them to stop taking merchandise from me or else they will picket the store." That thereafter pickets also appeared in front of the Diamond Bakery Co. and members of the Union followed him to about nine stops (R. 104). Members of the Union went into the retail stores, following the respondent, and advised the owners thereof that Platzman "was not a Union man, and that if they accept merchandise from me, the following day they would picket the store" (R. 107). He did not employ anyone (R. 108).

The owner of one of the bakeries testified that the union delegate advised him to tell the respondents that they would have to furnish a day's employment each week and that "he held me personally responsible, if I were not to tell them, or they were not to give the work" (R. 117, 118) and "that the reason why the pickets were there is because these boys did not give Union men work, and that I would be responsible for the two days previous that the Union men came in and were not employed by these people" (R. 119). The delegate gave a one day notice that the bakery stop baking for the respondents (R. 119). He nevertheless sold merchandise to the respondents and pickets appeared in front of his place of business (R. 120).

Not one word of this testimony was contradicted by the petitioners. Not one witness, among the many who were named by the respondents, took the witness stand to refute any portion of this testimony. The petitioners, for their entire case, made certain offers of proof through counsel, concerning general conditions in the trade and certain general practices of peddlers, very few of which were connected up with the respondents herein.

Among the offers of proof, defendant stated that during the eighteen month period preceding the dispute herein, approximately one hundred fifty drivers, members of the

Union, were required to sever their connections with employers unless they undertook to become peddlers or jobbers, working for their former employers and serving he same as heretofore (R. 51). The petitioners also stated that out of such one hundred fifty drivers about fifty members of the Union became peddlers and abandoned their membership in the Union (R. 52). Thus it appears that this condition started three and one-half years after respondent Wohl began his business, and one-half year after Platzman became engaged in his enterprise. *The Union did not produce any testimony showing that any other peddlers, retail stores or bakeries had ever been picketed. Petitioners did not show that they had ever appealed to the public, retail stores or bakers protesting against the alleged evils of the peddler system.* The petitioners did not offer any testimony showing that it had ever engaged in any industry-wide campaigns, as other Unions have done, to expose and eradicate the alleged evils of the peddler system. The uncontradicted proof established that the Union seized upon the pretext that the respondents were peddlers for the purpose of forcing them to furnish unnecessary employment—help which the respondents did not require in the normal conduct of their business nor could they afford to pay for.

The trial Court saw through this sham, in its decision, when it found that the intent and primary purpose of the Union was to compel the respondents to hire unnecessary help. The Court said, "The proof is that the defendant threatens to picket these manufacturers and the various customers of the plaintiffs unless each of the plaintiffs employs a member of the defendant Union one day a week to assist them" (R. 180). This decision and the findings were affirmed by two Appellate Courts and unequivocally established the real purpose and intent of the petitioners herein. The attempt of the Union to change its position after litigation was commenced by relying upon the

"peddler system" in an effort to justify and escape the consequences of its conduct, did not deter the trial Court in determining the true intent of the combination. The trial Court, at the request of the petitioners herein, refused to find that the purpose of the picketing was to eradicate the peddler system. The Court refused the petitioners' request to find that they had "solely acted with the desire and purpose of maintaining Union wages, hours and conditions and in the definite belief that the extension of the peddler system, uncontrolled and unregulated, already has partially weakened the maintenance of this Union's wages, etc." (R. 35, 36). The Court further refused to find that the sole purpose of the picketing was to eradicate the peddler system and that "the action of the defendants would reasonably be expected to aid in carrying out the purposes of the defendant Union" (R. 42).

B: The Acts and Conduct Enjoined

The injunction is very short, concise, and narrowly drawn. It deals specifically and only with the conduct described in the testimony and disapproved of by the Court.

The trial Court found as a conclusion of law:

> "2. That the plaintiffs are the sole persons required to run their business and therefore they are not subject to picketing by a Union or by the defendants who seek to compel them to employ Union labor" (R. 59).

Thus, the Court fixed the reason why the respondents are not subject to picketing, to wit: Inasmuch as they are the sole persons required to conduct their businesses, the Union may not picket for the purpose of compelling them to employ unnecessary labor.

The judgment under review merely enjoins the defendants:

> "(a) From picketing the places of business of manufacturing bakers who sell to the plaintiffs or either of them because of the fact that said manufacturing bakers sell to these plaintiffs; and
>
> (b) From picketing the places of business of customers of these plaintiffs because such customers purchase baked products from these plaintiffs" (R. 62).

It is apparent that the injunction is very limited and prohibits only the conduct indulged in by the defendants for the purpose of compelling respondents to hire unnecessary help. The decree does not prohibit the petitioners herein from engaging in a campaign to eradicate the peddler system throughout the trade. It does not prevent the Union from advertising by means of circulars, newspapers, oral statements, direct communications and other means to all stores and bakers with which the respondents deal. The only prohibition as far as the respondents' customers and bakeries are concerned is against picketing. All other means are still at the disposal of the petitioners. The decree in no way affects the rights of the petitioners to expose the so-called evils of the peddler system and to bring such evils to the attention of the public and all those in the trade directly interested. The decree does not prohibit the Union from picketing all other bakeries and retail stores in the industry in their legitimate endeavors to prevent the spread and growth of the peddler system.

Statements in the petitioners' brief under "Specifications of Errors to be Urged" (p. 9) that the injunction "absolutely prohibited the exercise of the constitutional privilege of freedom of speech" are inaccurate. No absolute sweeping, or broad prohibition is involved herein. The specific conduct in furtherance of the specific unlawful

purpose is enjoined. The petitioners are at liberty, at any time, to take all customary steps, as other Unions have done, to attempt to destroy and liquidate the peddler system. They cannot, however, picket respondents' few manufacturers and small number of customers to compel the plaintiffs to hire unnecessary help and to abstain from performing all their work in their own business.

C. The danger to the multitudes of small businesses in the City of New York in permitting picketing for the sole purpose of compelling a merchant who works alone to hire unnecessary help, and its resulting serious social and economic evil.

We are dealing with a principle of law, the application of which may vary in degree, depending upon the extent of the demands of a Union. If a State permits picketing for the sole purpose of compelling such small business men to furnish unnecessary employment, it is then obvious that so long as the right is given, no one but Unions can determine the amount and duration of employment sought. Although in the instant case, the petitioners sought employment for one day per week, it cannot be denied that if they are given the legal right to do this by the means they have used, then they would be within their rights in demanding, two, three or six days' work per week throughout the year. At the end of the year they would be at liberty to continue this practice, year after year. If permitted to force the hiring of one man certainly they would have the right to insist upon the hiring of an additional employee or employees to assist the first employee. This is so because once the right is granted, whether the demands of a Union are great or small, the little business man with whom we are concerned can never be heard to protest, even when the application of the rule varies in degree to the point where annihilation of his business is imminent or an accomplished fact.

The State of New York in shaping its public policy has declared that no Union may picket any of its small businessmen for the purpose of compelling them to hire unnecessary help, where such proprietors operate their business alone without any employees. This public policy applies alike to the tens of thousands of retail stores of various kinds, as well as to the bootblack, the news vendor, the peddler, the small manufacturer, etc. From the cases hereinafter referred to, it will be seen that many Unions in the City of New York have sought by means of picketing to compel such small businessmen to hire an unnecessary employee anywhere from one day per week to six days per week throughout the year. In some cases Unions have sought to compel the hiring of more than one employee.

This dispute arose in the City of New York with its more than seven millions of inhabitants. New York City, the largest city in the world, is a highly industrialized and commercialized community. In the past five years, during the rapid rise of labor Unions throughout the nation, Unions have also made marked progress in the City of New York. It is common knowledge that within the City of New York there are situated tens of thousands of individuals conducting small businesses, alone without hiring any employees, except in some cases for the occasional assistance of a spouse or child. Included among such businesses are thousands upon thousands of retail stores—the neighborhood grocer, shoe maker, vegetable store, tailor, baker, candy store, etc. and countless others. In addition, there are thousands upon thousands of small manufacturers who operate without help, as well as jobbers, peddlers, etc. Unions, in an effort to alleviate their unemployment, made it a practice, during the past few years to compel persons who are operating a one-man business without help, to hire unemployed members of the Union anywhere from one day a week to six days per week throughout the year. The mere threat of a picket

was sufficient in many instances to compel acquiescence to the demands of the Unions. Poor, defenseless and hard working men who toiled through long hours of labor were thus forced to part with moneys, in many cases, sorely needed in their own businesses and for the support of their families. Where the demands of a Union were refused, pickets were placed in front of stores or other places of business with signs and placards which bore the words, "Unfair"—"This store refuses to employ Union labor"—"Unfair to organized labor"—"Non-Union labor used" and many other phrases of similar import, all of which truthfully informed passersby of a certain fact or opinion. Such picketing, except in extremely few cases, caused complete capitulation in a very short time. The severe loss of business as a result of such picketing left the proprietors with no alternative but to spend moneys for unnecessary services. Thus, proprietors who had operated for years without help, fell prey to such activity. Such conduct on the part of some Unions amounted to nothing more than extortion.

The Courts of the State of New York in shaping the public policy best suited to the inhabitants of that State declared that policy to be that where a person conducted a business without employing any employees a Union could not picket such employer for the purpose of compelling him to hire unnecessary help. In establishing this public policy the Courts of the State of New York did not prohibit picketing for all purposes where such employers were affected. The prohibition against picketing was directed solely against Unions when they sought to compel the hiring of unnecessary help. This was done for the purpose of eradicating the great social evil whereby one class of individuals combined into powerful Unions were able, through the great power which such combinations gave them, to force tens of thousands of small business men individually to part with hard earned moneys

and small profits which long hours of labor brought to them, in return for services which they did not require. It was inevitable that any State which would permit the power of trade Unions to be exerted for such purposes would deprive small businesses of an opportunity of thriving and growing and in many cases permit an unwarranted drainage of capital from such small businesses to the point where bankruptcy and insolvency would result. In the interests of a sound public policy Unions were not permitted to use their power against a one-man business for the purpose of dictating how many employees or amount of employment such business should furnish. Thus, the constitutional right of such small business men to conduct their businesses without unjustified interference was protected.

In so doing, the State of New York was preventing a condition which must be viewed as a serious evil—one which was immediate and pressing. Prohibiting picketing for this sole purpose was extremely necessary to protect the property, the small capital and income of these business men. To many, hiring of unnecessary help would mean a smaller income for living purposes, to others it would mean practically no income, and to some, in many cases it would mean using capital assets of the business for support and maintenance. Thus, the standard of living of some would be drastically lowered; others in a short time would face insolvency and bankruptcy, and where insolvency would occur it must be remembered that not only the proprietors would suffer, but his jobbers and manufacturers and their employees would likewise be affected by such loss. Such small proprietors whose businesses would be so dissipated would then become public charges depending upon charities and relief for the support of themselves and their families. Not only would these unfortunate persons be unjustifiably deprived of their property and money, but the State would ultimately

be the greatest loser. The eventual extinction of this class of proprietor—our middle class, often referred to as the backbone of the nation—would result in great social and economic evil to the State. These numerous business men are tax payers who are a substantial source of revenue upon which the State depends to help maintain the community. Besides losing this revenue, the State would be called upon to increase its contributions for charity, not only for the individual, but for the members of his family as well. In addition, it is common knowledge that relief allowances are insufficient to maintain oneself in a proper state of health. Thus, the health of thousands of its residents would also be affected by a lower standard of living.

This nation has always prided itself that under our laws and constitution this country is a land of opportunity for the individual. Permitting the practice of the petitioners herein would necessarily result in this opportunity being forever removed. There would no longer be an incentive for the individual to use his skill, knowledge, ability and capital to create, produce or to better himself. The fear that the moment he opens a small business, a Union will demand the hiring of unnecessary help would be sufficient to deter him from engaging in business. The dilemma of such proprietor is also increased by the almost complete unionization of industry as it exists today. Having been forced out of business, there would be only two alternatives left, (1) to seek employment as an employee, (2) to attempt to go back into business again. With respect to the first alternative we must recognize that with industry so well organized by trade unions today, it is virtually impossible for newcomers to obtain membership in a Union. Employment in a particular industry is reserved for the unemployed members of the Union. This is particularly true where the closed shop principle has been adopted and has been in effect in New York for many years. So long as unemployment exists, labor Unions

will not accept strangers as members. Therefore, opportunities for employment would be limited. The second alternative offers the proprietor small solace. To return to business again would be, at best, only a temporary measure. The means resorted to by labor Unions to compel the hiring of unnecessary labor, would stand as an ever overhanging threat, and if enforced, would once more result in a cessation of business. Therefore, finding the avenues of employment practically closed because of the organization of Unions under the closed shop principle in New York and with no incentive or future in returning to business, the small businessman would appear to be doomed to a permanent status on the relief rolls of the State.

Furthermore, such practices tend to have a bad effect upon the workers themselves. Instead of honest effort being directed toward creating and producing for the good of the community, workers will rely upon this modified form of extortion, as a means to an end. It is to the economic interest of the State as well as the nation that workers use their labor to create, manufacture and produce. Approval of the doctrine contended for by the petitioners would only make for economic waste and unnecessary duplication of effort.

And lastly, today, the need for protection of the little business man is greater than ever. With the growth of big business and the rapid rise of chain store competition, the little businessman has found it more difficult to exist. Big business and chain stores with their unlimited capital and improved methods, buy and merchandise at lower prices and undersell the small proprietor. The principal reason why the little businessman has been able to survive is by personally laboring longer hours in his business. This personal effort and personal service rendered to his customers has universally been recognized as the main reason for his continuance. To remove the barrier of pro-

tection which the State of New York has thrown up to protect its multitudes of small proprietors, when Unions seek to force the hiring of unnecessary help, would strike the death knell for the multitudes of small businesses in New York and result in great social and economic evil to the State.

POINT I.

The Court of Appeals of New York has held that picketing to compel an employer who operates a business alone to hire unnecessary help is in furtherance of an unlawful purpose.

See:

Thompson v. *Bockhout*, 273 N. Y. 390;
Luft v. *Flove*, 270 N. Y. 640;
Boro Park Sanitary Live Poultry Market v. *Heller*, 280 N. Y. 481;
Goldfinger v. *Feintuch*, 276 N. Y. 281.

In the *Goldfinger* case the Court, in referring to the *Thompson* and *Luft* cases declared that the "purpose" of picketing, in such cases to compel the hiring of unnecessary labor "was unlawful."

The latest expression of this public policy is found in the case of *Opera-on-Tour* v. *Weber*, 285 N. Y. 348, where that Court in referring to the decision in this case, as well as *Thompson* v. *Bockhout*, said:

> "We have held that the attempt of a union to coerce the owners of a small business, who was running the same without an employee, to make employment for an employee, was unlawful objective and that this did not involve a labor dispute (*Thompson* v. *Bockhout*, 273 N. Y. 390). So, too, in a case that we unanimously decided, we held that it was an unlawful labor objective to attempt to coerce a peddler employing no employees in his

> business and making approximately thirty-two dollars a week, to hire an employee at nine dollars a day for one day a week (*Wohl* v. *Bakery and Pastry Drivers*, 284 N. Y. 220)."

That the petitioners herein come within the prohibitions laid down by these cases is clear for on page 3 of their brief they now admit:

> "The specific object of the union was to induce the respondents, who worked seven days each week without respite, to hire members of the union as relief drivers for one day of the week, * * *."

Unions in New York, during the past few years, made it a practice to compel such employers to hire unnecessary help and to abstain from performing all their work. Our Courts on countless occasions were called upon to enjoin this conduct which not only unjustifiably deprived the residents of the State of their property, and an opportunity to work with their own hands, but in addition endangered the social and economic structure of the State. A glance at some of the decisions rendered by the New York courts dealing with such an objective reveals that this practice was serious and widespread. See: *Botnick* v. *Winokur* (1939) 7 N. Y. S. (2d) 6; *Kershnar* v. *Heller*, 14 N. Y. S. 2d 595; *Gips* v. *Osman*, (1939), 170 Misc. 53, aff'd 258 A. D. 789; *Miller* v. *Fish Workers Union* (1939), 170 Misc. 713; *Pitter* v. *Kaminsky* (1939), 7 N. Y. S. (2d) 10; *Lyons* v. *Meyerson* (1940), 18 N. Y. S. (2d) 363; *Paul* v. *Mencher* (1939), 169 Misc. 657; *Wishny* v. *Jones* (1939), 169 Misc. 459; *Pappas* v. *Straughn*, New York Law Journal 9/11/40—p. 593; *Sussman* v. *Maltz*, *ibid*, 9/21/40—p. 731; *Zawin* v. *Doe*, *ibid*, 7/15/40—p. 111; *Gilordi* v. "*John Doe*", *ibid*, 10/10/40—p. 1033; *Goldberg* v. *Straughn*, *ibid*, 10/8/40, Justice May, Kings County Supreme Court, Special Term Part I; *Marvin* v. *Frisch*, *ibid*, Supreme Ct, N.

Y. County, Sp. Term Part III, Justice SCHMUCK, 10/6/39; *Simon* v. *Boris*, *ibid*, Bronx Supreme Court, Spec. Term Part I, 1/24/39; *Bieber* v. *Binenbaum*, *ibid*, Special Term I, Bronx Supreme Court, 8/2/1938; *Schlossberg* v. *Winokur*, *ibid*, Special Term, Supreme Ct., Queens County, 5/12/39; *Leach* v. *Himmelfarb*, *ibid*, 2/23/40—p. 843; *Anastasion* v. *Supron*, *ibid*, 5/24/40—p. 2371; *Ziveibon* v. *Goldberg*, *ibid*, 4/19/40—p. 1789.

In addition, numerous other cases, not officially reported, appeared in the New York Law Journal. Further reference to them would be repetitious and unduly burden this brief.

POINT II.

The unlawfulness of such objective is a question of local policy to be determined by the Court of Appeals of New York. This Court will not interfere with such decision.

In an analogous case, this Court in *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, held that the law as declared by the highest Court of the State determines whether such activity may be permitted and that it was no concern of this Court what the public policy of the State was in this regard. There, a Union sought by means of pickets to compel a proprietor of a small business to refrain from working in his own busjness. Justice BRANDEIS said:

> "Whether it was wise for the State to permit the Union to do so is a question of its public policy—not our concern."

For this Court to say, as petitioners urge, that the State of New York may not declare such an objective to be inimical to the best interests of its residents, as well as the State, would intrude into the State's realm of policy making. Justice BRANDEIS also said that it was for the

State Court to decide whether picketing for such an objective was for a lawful or an unlawful end.

Consistently with the preservation of a constitutional balance between State and Federal sovereignty, the United States Supreme Court must respect and is reluctant to interfere with the States' determination of local, social or economic policy. (*Avery* v. *Alabama*, 308 U. S. 444; *Green* v. *Frazier*, 253 U. S. 233, 239, 240; *Nebbia* v. *New York*, 291 U. S. 502, 537-8.) The State Courts have supreme power to interpret written and unwritten laws of the State. This Court will not attempt to decide local questions, the final judgment of the State Court being viewed as final. (*Brinkerhoff-Faris* v. *Hill*, 281 U. S. 673; *American Ry. Express* v. *Commonwealth of Kentucky*, 273 U. S. 269; *United Gas* v. *State of Texas*, 303 U. S. 123.)

POINT III.

Picketing in furtherance of an unlawful purpose may not be protected under the guise of freedom of speech.

Such a prominent guardian of civil liberties as Justice Cardozo, while sitting on the New York Court of Appeals bench, concurred in two outstanding opinions wherein the right of picketing to accomplish an unlawful purpose was withdrawn from labor Unions. In the oft-quoted case of *Exchange Bakery & Restaurant* v. *Rifkin*, 245 N. Y. 263, it was said:

> "What one man may do, two may do or a dozen, so long as they act independently. If, however, any action taken is concerted; if it is planned to produce some result, it is subject to control. As always, what is done, if legal, must be to effect some lawful result by lawful means, but both a result and a means lawful in the case of an individual may be unlawful if the joint action of a number.

"A combination to strike or to picket an employer's factory to the end of coercing him to commit a crime, or to pay a stale or disputed claim, would be unlawful in itself, * * * Likewise a combination to effect many other results would be wrongful. * * * Another's business may not be so injured or ruined. It may be attacked only to attain some purpose in the eye of the law thought sufficient to justify the harm that may be done to others.

* * * * *

"Where the end or the means are unlawful and the damage has already been done, the remedy is given by a criminal prosecution or by a recovery of damages at law. Equity is to be invoked only to give protection for the future. To prevent repeated violations, threatened or probable, of the complainant's property rights, an injunction may be granted. * * * Freedom to conduct a business, freedom to engage in labor, each is like a property right. Threatened and unjustified interference with either will be prevented."

In *Interborough* v. *Lavin*, 247 N. Y. 65, 82, 83, the same Court held:

"In this state the courts may interpose their mandates between contesting parties only where there is attempt to effectuate a lawful purpose, or to effectuate a lawful purpose by unlawful means. * * * Business and property rights in their broadest sense should be immune from malicious interference. They rest upon established principles of law; they are subject to attack within limits fixed by law."

Justice Cardozo, in another renowned case, *Nann* v. *Raimst*, 255 N. Y. 307, 317, after citing and quoting from *Exchange* v. *Rifkin*, said that a Court of equity,

> "intervenes in those cases where restraint becomes essential to the preservation of a business or of other property interests threatened with impairment by illegal combinations or by other tortious acts, *the publication of the words being merely an instrument and incident.*" (Italics ours.)

This Court has approved of the same doctrine:
See:

> *American Foundries* v. *Tri City Council*, 257 U. S. 184;
> *Gompers* v. *Bucks Stove and Range Co.*, 221 U. S. 418;
> *Dorchy* v. *Kansas*, 272 U. S. 306, 311;
> *Truax* v. *Corrigan*, 257 U. S. 312.

In *Gompers* v. *Bucks Stove, supra,* a decision concurred in by Justice Holmes and later referred to by him in his opinion in *Schenck* v. *U. S.*, 249 U. S. 47, 52, the defendant insisted "that the Court could not abridge the liberty of speech * * * that the injunction as a whole was a nullity." However, this Court said:

> "Society itself is an organization and does not object to organizations for social, religious, business and all legal purposes. The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence and power that come from such association. By virtue of this right powerful labor unions have been organized.
>
> But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights

protected by the constitution; or by standing on such rights and appealing to the preventive powers of a court of equity. When such appeal is made it is the duty of government to protect the one against the many as well as the many against the one.

In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published, gives the words 'Unfair', 'We don't patronize', or similar expressions, a force not inhering in the words themselves, and *therefore exceeding any possible right of speech which a single individual might have.* Under such circumstances, they become what have been called 'verbal acts', and as much subject to injunction as the use of any other force whereby property is unlawfully damaged." (Italics new.)

In *Dorchy* v. *Kansas*, *supra*, p. 311, Justice BRANDEIS stated that concerted action to accomplish illegal purposes was not permissible. He said:

"The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. * * * To enforce payment by a strike is clearly coercion. The legislature may make such action punishable criminally, as extortion or otherwise. * * * Neither the common law, nor the Fourteenth amendment, confers the absolute right to strike. Compare Aikens v. Wisconsin, 195 U. S. 194, 204-5."

That this should be the law is sound, because freedom of speech or picketing and strikes should not be permitted to assist those who pervert its legitimate use by employing

it for objectives condemned by society in general. Otherwise, there will be no protection in cases where a representative of the Union might demand a lump sum of money under the threat of picketing if an employer under such circumstances were to refuse to become a party to such attempted extortion. It is inconceivable that any society would permit such representatives of labor to picket the premises of an employer under the pretext or feigned issue that he was unfair.

In the case at bar, after litigation was commenced, the Union sought to justify its conduct under the pretext that it was thereby seeking to solve the problem of the peddler system. However, the Trial Court refused to find that that was their purpose and, based upon the uncontradicted evidence, found that the primary purpose was to compel the hiring of unnecessary labor. Mr. Justice HOLMES recognized this in *Aikens* v. *Wisconsin* (195 U. S. 194) where he said:

> "When the acts consist of making a combination calculable to cause temporal damage, the power to punish such acts when done maliciously cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot and if it is a step in a plot, neither its innocence nor the constitution is sufficient to prevent the punishment of the plot by law."

The mere fact that a labor union might feel that a peddler system is injurious to its members does not give it a right to extort money from small business men, nor does it give it the right to use pickets for the purpose of compelling such employers to commit a crime, or to fix the

prices of commodities, or for many other reasons which have been condemned as contrary to the wellbeing of our society. The issue in this case was not whether peaceful picketing was permissible to expose the evils of a peddler system. The only issue was whether the respondents could be coerced into hiring the amount of help the Union sought to impose upon them.

It was only after litigation commenced that the Union first raised the peddler system in an attempt to justify its legal conduct. However, the uncontradicted testimony, as well as the findings of the Trial Court, as affirmed by the Appellate Courts, showed that the Union really relied upon the peddler system as a pretext, and that it was not advanced in good faith. This is evidenced by the fact that instead of conducting a program of picketing throughout the trade generally to enlighten the public as to the evils of the peddler system, the Union merely demanded employment under the penalty of injuring the respondents' business. As was said in the case of *Auburn Draying Co.* v. *Wardell*, 178 App. Div. 270, affirmed 227 N. Y. 1:

> "The general argument of good to labor conditions cannot be made a cloak to shield the actors from the consequences of acts done in furtherance of the unlawful purpose. * * * If it be unlawful, it may not be shielded behind general arguments for real or fancied good to organized labor."

To the same effect, see also

Vonnegut v. *Toledo*, 263 Fed. 192, 202.

In the recent case of *Hague, et al.* v. *C. I. O.*, 307 U. S. 496, Chief Justice STONE, in a concurring opinion, said:

> "It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and assembly *for any lawful purpose* are rights of personal liberty secured to all persons, without regard to citizenship, by the due process

clause of the Fourteenth Amendment. *Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357; *Fiske* v. *Kansas*, 274 U. S. 380; *Stromberg* v. *California*, 283 U. S. 359; *Near* v. *Minnesota*, 283 U. S. 697; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *De Jonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; *Lovell* v. *Griffin*, 303 U. S. 444." (Italics new.)

In *The Labor Injunction* (Frankfurter and Greene), page 25, it is said:

> "The damage inflicted by combative measures of a union—the strike, the boycott, the picket—must win immunity by its purpose. But neither this nor any other formula will save the courts the painful necessity of deciding whether, in a given conflict, privilege has been overstepped. The broad questions of law—what are permissible purposes and instruments for damage,—and the intricate issues of fact to which they must be applied, together constitute the area of judicial discretion within which diversity of opinion finds ample scope."

In recognizing the right of workers to combine as a corollary to the dogma of free competition and as a means of equalizing the factors that determine bargaining power, the authors of that text said that the consequences sometimes result in hardships and cruelties, but where such effect to our competitive system occurs "Wise statesmanship here enters to determine at precisely what points the cost of competition is 'too great'" (p. 205).

The State of New York in thus fixing its public policy has determined that "the cost of competition is too great".

Concededly, a labor Union or a resident of the State cannot be deprived of a right to picket or to exercise freedom of speech, where a State Court arbitrarily labels an

objective "unlawful". There is no magic in this word which will automatically deprive organizations and individuals of deep rooted constitutional rights. However, where the determination of the State Court is actually based upon an unjustifiable interference with the property rights of its resident, or where the exercise of such constitutional rights give rise to an immediate, serious, social or economic evil to the State itself, this Court will not interfere with any limited prohibition of the State Court.

It has been repeatedly held that a State, through its legislature or Courts, may permit the issuance of a narrowly drawn injunction to remedy a specific abuse where either of two conditions exist.

(1) To prevent an unjustifiable interference with the property or property rights of its residents, or

(2) To protect the State from serious, immediate, social or economic evil.

With respect to the first ground, an employer's business has been declared to be a property right and unjustifiable interference therewith may be enjoined. (*Exchange* v. *Rifkin, supra; Gompers* v. *Bucks Stove, supra; Truax* v. *Corrigan, supra; Senn* v. *Tile Layers Union, supra,* dissenting opinion.)

The power of a State to protect the property of its residents from unjustifiable interference cannot be doubted. In *Thornhill* v. *Alabama*, 310 U. S. 88, this Court said:

> "The power and the duty of the State to take adequate steps * * * to protect the privacy, lives and the property of its residents cannot be doubted."

To the same effect, see, *Carlson* v. *California*, 310 U. S. 106.

No one can deny or dispute the fact that the specific object of the petitioners, herein, to compel the plaintiffs to hire unnecessary help, or conduct of persons compelling

employers who operate alone to hire a steady employee for 52 full weeks a year, is an unjustifiable interference with the property rights of such employers. The disadvantages to the community far outweigh any temporary advantages which the petitioners may secure by their conduct. Under such circumstances, the end sought is not justifiable. (*The Labor Injunction;* Frankfurter and Greene, p. 24; Holmes, *Privilege, Malice and Intent,* 8 Har. L. Rev. 1; Holmes, *Aikens* v. *Wisconsin, supra.*)

There is also a long line of cases decided by this Court which forbid action which takes from the individual the right to engage in common occupations of life and which interferes with his engaging in a lawful business. In *Coppage* v. *Kansas,* 236 U. S. 1, 14, it was said:

> "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money."

In *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370, this Court stated:

> "For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

This principle is reiterated in *Meyer* v. *Nebraska*, 262 U. S. 390, 399; *Butchers Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 762; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, and others which are more fully discussed in the dissenting opinion in *Senn* v. *Tile Layers Protective Union*, *supra*.

With respect to the second ground, it is submitted that picketing may be curtailed by a State Court by a narrowly drawn injunction prohibiting the specific abuse, where there is reasonable ground to fear that the exercise thereof will result in serious evil, and where there is reasonable ground to believe that the evil is a serious one, and that the danger apprehended is reasonably imminent.

In reviewing the important decisions of this Court bearing on this question, it is important to keep in mind the fact that in the instant case we are not dealing with a sweeping, broad or absolute restriction. Here, we have an injunction which is limited in scope and narrowly drawn, covering a specific abuse.

In *Milkwagon Drivers Union* v. *Meadowmoor Dairies*, 61 Sup. Ct. 552, the Union picketed against the "vendor system" whereby milk was sold by dairy companies to vendors who operated their own trucks, who in turn resold this product to retailers. This method of distribution was cheaper and enabled the dairies to sell milk to "cut rate" stores and these "cut rate" stores were enabled to sell milk at a lower retail price than that fixed by dairies employing Union labor. It also appeared the dairies considered these vendors their own employees, many of whom had formerly been chauffeurs who continued servicing the same routes after a change of status to "vendor". The Union in protesting, embarked upon an industry wide campaign of picketing for the specific purpose of compelling the retail stores and dairies to abandon completely this system of distribution, which was so injurious to the Union. However, the Union did not try to force a few

individual vendors to furnish unnecessary employment to its members. Picketing was undertaken to eradicate the entire evil and not as a subterfuge to force illegal concessions from a few vendors.

Justice FRANKFURTER upheld the injunction granted by the State Court because of violence which had occurred in the course of the picketing. He declared that free speech was not an absolute right and pointed out the distinction between a decree directed at a specific abuse and an abstract statute with an undefined threat to free utterance. He said:

> "Such a decree, arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance. To assimilate the two is to deny to the states their historic freedom to deal with controversies through the concreteness of individual litigation rather than through the abstractions of a general law."

In distinguishing the *Thornhill* and *Carlson* decisions he said, "They involve statutes baldly forbidding all picketing." Consequently, it is evident that the injunction issued in the case at bar, which applies to the particular controversy and is adjusted to it, raises a totally different constitutional problem than that in all the cases cited in the petitioners' brief. Here, New York State dealt with a controversy "through the concreteness of individual litigation rather than through the abstraction of a general law."

Justice FRANKFURTER, in discussing the right of a State to protect the property, privacy and peace of its residents, said, "In exercising its power a State is not to be treated as though the technicalities of the laws of agency were written into the Constitution." Despite the existence of

Federal questions he said, "To maintain the balance of our Federal system, insofar as it is committed to our care demands at once zealous regard for the guarantees of the Bill of Rights and *due recognition of the powers belonging to the States.*" He further held that, "The law of a State may be fitted to a concrete situation through the authority given by the State to its Courts" and that an injunction granted by the State Court should be "read in the context of its circumstances" and "nor ought State action be held unconstitutional by interpreting the law of the State as though, to use a phrase of Mr. Justice HOLMES, one were fired with a zeal to pervert." The petitioners in their brief constantly refer to an absolute prohibition against the exercise of free speech and the right to picket. Reading the injunction herein with the reason for its issuance, the conduct enjoined is clear and specific and the interpretation thereof by petitioners is wholly unwarranted. In concluding, he said, "Just because these industrial conflicts raise anxious difficulties, it is most important for us not to intrude into the realm of policy making by reading our own notions into the Constitution."

Mr. Justice BLACK who dissented, admitted that an injunction or an act narrowly drawn to prevent a supposed evil would pose a different constitutional question and that in such cases, a declaration of the States' policy would weigh heavily in any challenge of the law as infringing constitutional limitations. However, he felt that the Supreme Court of Illinois in affirming the injunction had "not marked the limits of the rule with that clarity which should be a prerequisite to abridgement of free speech." His principal objection appeared to be that the decree was a "sweeping injunction" and that its language was so broad and general that it affected not only the direct participants in the dispute but could be construed to affect total strangers, members of the public who might innocently speak, write or publish an opinion concerning

the dispute. He said, "In the present case the prohibition against dissemination of information through peaceful picketing was but one of the many restraints imposed by the sweeping injunction." The decree in the instant case could not come within the condemnation of this opinion, but, on the contrary appears to fit into the exception which was noted therein.

In *Thornhill* v. *Alabama*, 310 U. S. 88, this Court struck down a broad and sweeping statute which prevented the peaceful dissemination of the facts of a labor dispute. Justice MURPHY referred to "the sweeping regulations" thereof and that the statute "does not aim specifically at evils within the allowable area of State control". In addition, he said, "a statute narrowly drawn to cover the precise situation giving rise to the danger" would present a totally different question from that before the Court. He was careful to point out that:

> "It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. See Mr. Justice Brandeis in 254 U. S. at 488."

And that

> "The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, *the nature of their dispute with an employer*, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute." (Italics ours.)

Thus it appears that although picketing is clothed with the right of free speech a State may make exceptions based upon the number of persons engaged in picketing, the peaceful character of their demeanor and depending upon "*the nature of their dispute with an employer*". This Court realized that there does exist occasions when the State must be permitted to restrain peaceful picketing where the nature of a dispute is such that it may amount to an unwarranted interference with the property rights of its residents or give rise to a serious evil against the State itself. The nature of the specific dispute herein is such, that it comes within the allowable area of State control.

In *Carlson* v. *California*, 310 U. S. 106, this Court struck down a Municipal ordinance prohibiting picketing and the display of banners at the scene of a labor dispute on the ground that it violated the constitutional guarantee of free speech. There, too, the statute was a broad sweeping one and came within the condemnation of the *Thornhill* case. The Court said:

> "The sweeping and inexact terms of the ordinance disclose the threat to freedom of speech inherent in its existence."

Schneider v. *State of New Jersey*, 60 Sup. Ct. 146, involved broad and general ordinances in Irvington, New Jersey; Milwaukee, Wisconsin; Los Angeles, California; and Worcester, Massachusetts, prohibiting distribution of handbills on the public streets. The Court there said:

> "As cases arise, the delicate and difficult task falls upon the Courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

In *Whitney* v. *California*, 274 U. S. 357, Justice BRANDEIS, in referring to broad and absolute statutes and injunctions, said:

> "But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, *economic* or moral. That the necessity which is essential to a valid restriction does not exist unless free speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent, has been settled." (Italic new.)
>
> . . . . . .
>
> "This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgement of speech."
>
> . . . . . .
>
> "To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one."

The effort of the State of New York to prevent Unions, in general, from foisting unnecessary help upon business men who employ no one, should not be disturbed. As heretofore pointed out, the evil was a serious one and there existed reasonable ground to believe that this serious evil would result. There also was reasonable ground to believe that the danger thereof was substantial and imminent. In-

asmuch as this Court has not fixed the standard by which to determine when the danger shall be deemed clear, or how remote the danger may be and yet be deemed present, and what degree of evil shall be deemed sufficiently substantial, this Court should be slow to disturb the public policy of the State of New York because, as was said by Mr. Justice HOLMES in *Otis* v. *Parker*, 187 U. S. 606, 609, "As it is often difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law making power". It is only where the constitutional liberty of a resident has been interfered with beyond reasonable controversy that this Court may disturb the public policy of a State. In *Green* v. *Frazier*, 254 U. S. 233, 239, this Court said:

> "we are not at liberty to interfere unless it is clear beyond reasonable controversy that rights secured by the Federal Constitution have been violated."

In the *Thornhill*, *Carlson* and *Schneider* cases the Court dealt with broad and unlimited statutes where it was clear beyond reasonable controversy that the constitutional rights of residents had been violated. In the case at bar, the injunction was specifically limited to a specific abuse and was not an absolute deprivation of the petitioners' constitutional rights. There existed a threat of serious evil to the State as well as a malicious and unjustifiable interference with the property rights of its residents. Under these circumstances, it cannot be said that the State Court acted improperly. In addition, this Court had held that in considering the regulation of freedom of speech "the State Court is primarily the judge of regulations required in the interest of public * * * welfare" and if it should be contended that immediate danger to the State is not real and substantial because the effect of the utter-

ance cannot be accurately foreseen, this Court said, "and the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale." (*Gitlow* v. *New York*, 268 U. S. 652, 667.)

In *Cantwell* v. *Connecticut*, 310 U. S. 296, 307-8, this Court, in dealing with freedom of religion as one of the liberties protected by the Fourteenth Amendment, said that the evidence failed to disclose any conduct on the part of the defendants which could be reasonably said to invite a breach of the peace and that the judgment was based "on a common law concept of the most general and undefined nature", the situation being "analogous to a conviction under a statute sweeping in a great variety of conduct under a general and undefined characterization, and leaving to the executive and judicial branches too wide a discretion in its application". In discussing the power of a State to limit the absolute exercise of such right, the Court continued:

> "Decision as to the lawfulness of the conviction demands the weighing of two conflicting interests. The fundamental law declares the interest of the United States . . . that freedom to communicate information and opinion be not abridged. The State of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the States' interest, means to which end would, in the absence of limitation by the Federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact.

> "Violation of an act • • • narrowly drawn to prevent the supposed evil would pose a question differing from that we must here answer. *Such a declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations.* Here, however, the judgment is based on a common law concept of the most general and undefined nature." (Italics ours.)

The opinion concludes that "in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State" the conviction of the defendant had to be set aside.

In *De Jonge* v. *State of Oregon*, 299 U. S. 353, 365, and *Near* v. *Minnesota*, 283 U. S. 697, 908, this Court reaffirmed the principle that freedom of speech and of the press are not absolute rights and must be exercised for a lawful purpose and that a State may deal with a specific abuse of such constitutional rights.

In weighing the substantiality of the reasons advanced herein in the light of the narrowly drawn and limited injunction granted, no violation of the petitioners' rights, such as condemned by the cases hereinabove referred to, has been made out. To deny to the State of New York power to protect the property rights and business of its residents and to prevent the wide-spread practice of an immediate and dangerous evil to a substantial portion of its residents and also to itself, would violate the long established inherent right of the State to take such action on behalf of itself and its citizens.

Among the many consequences which would result from the practice condemned by the State Court, we have mentioned the economic waste which is inimical to the interests of the State as well as the nation. This Court has taken judicial notice of this in its recent decision in *Phelps*

Dodge Corp. v. *N. L. R. B.*, 313 U. S. 177, when it spoke of its concern for a "healthy policy of promoting production".

State Courts in the past have been permitted to limit picketing for specific abuses when in furtherance of unlawful purposes. Picketing has been held unlawful for the purposes of compelling an employer to commit a crime or to pay a stale wage claim (*Exchange* v. *Rifkin, supra*), to fix prices (*Standard* v. *Volz*, 200 App. Div. 758), to extort moneys, (*Dorchy* v. *Kansas, supra*), the commission of violence (*Milk Wagon Drivers* v. *Meadowmoor*), in violation of a contract agreeing to refrain from picketing and submitting disputes to arbitration (*Uneeda Credit Clothing Stores* v. *Breskin*, 14 N. Y. S. 2d 964; *Shop'N Save* v. *Retail Food Clerks Union*, California Superior Court, Los Angeles County, May 6th, 1940). In the administration of the National Labor Relations Act and the various State labor acts, freedom of expression on the part of employers for purposes which constitute violations of these acts has been prohibited by administrative agencies empowered to act by law as well as courts which have sustained such orders. In *N. L. R. B.* v. *Chicago Apparatus Company*, 116 Fed. 2d 753 (C. C. A. 7th), the Court said:

> "Expressions of opinion concerning labor unions, by an employer, either written or merely spoken, may be of such a nature that their effect is to coerce and intimidate the employees, contrary to the provisions of the National Labor Relations Act. To hold that such expression, when employer manifestly intended to give them such an effect, are not violative of the Labor Act, would be to nullify the provisions of the Act and to thwart the public policy evidenced by said Act."

To the same effect see:

N. L. R. B. v. *Virginia Electric and Power Company* (October Term 1941, U. S. , decided Dec. 22, 1941).

Other States have found it necessary to take similar action to protect its residents and to ward off the serious evil threatened by such activity.

See:

Roraback v. *Motion Pictures*, 140 Minn. 481;
Hughes v. *Motion Pictures*, 282 Mo. 304.

In the *Roraback* case, the Court states one of its reasons for the prohibition of picketing where the sole question involved was whether an owner would be permitted to work in his own business. The Court said:

> "Such a doctrine would limit the field of business to those who have sufficient capital to carry on a business without becoming operatives therein themselves, and would debar those who have little or no capital, except their personal skill and ability, from seeking to better their condition by engaging in business on their account. * * * It means that a man in any occupation, who starts in business for himself relying upon his personal skill and ability to attain success must forego the right to profit by his own skill at the arbitrary behest of another, or see his business ruined. Such is not the law. The right of every person to work in his own business is a fundamental right guaranteed to him by the bill of rights * * * ."

POINT IV.

The petitioners' appeal should be dismissed because the question urged in its petition for certiorari is not presented for review on this appeal.

This Court in the case of *Rorich* v. *Devan*, 307 U. S. 299, said that only the questions urged in the petition for certiorari and incidental to their determination will be considered on review. On page 8 of the petition for the writ

of certiorari under "Questions Presented" petitioners stated:

> "(1) May a State Court absolutely enjoin admittedly peaceful and orderly picketing by a legitimate labor organization, merely because that picketing is not directed against an employer of members of the Union?
>
> (2) Assuming that the previous question must be answered in the negative, should an exception to the rule be established because in this case the Union was protesting against the peddler system rather than against the labor practices of a specific employer?
>
> In the discussion of the reasons for the allowance of the writ sought by the petitioner, immediately following, we shall consider in detail the foregoing questions."

The question presented in the petition was whether picketing could be prohibited where a Union "was protesting against the peddler system." Undoubtedly, the question was presented with the idea of conveying to this Court the impression that the New York State Court had absolutely enjoined the petitioners herein from following a course of conduct protesting against the peddler system similar to the peaceful picketing of Unions in the *Meadowmoor* and *Lake Valley Farm Products* cases recently decided by this Court.

However, petitioners' brief reveals that the primary and specific object of its picketing was directed solely against two individuals, the respondents herein, for the "specific object * * * to induce the respondents, who worked seven days each week without respite, to hire members of the Union as relief drivers for one day of the week." The petitioners' brief admits that no general course of picketing or publicity against the peddler system was resorted

to in this case similar to that of the *Meadowmoor* and *Lake Valley* cases. Whereas, in those cases the specific object of the Unions was to expose, eradicate and destroy the peddler system by a trade wide campaign of picketing against numerous manufacturers and retailers, the specific object of the petitioners herein was an attempt to foist unnecessary employees upon the respondents. As this is the specific and sole question to be determined upon this appeal and it is one totally different from the question presented in the petition for certiorari, it is submitted that the appeal be dismissed.

POINT V.

Refutation of arguments and cases cited in the petitioners' brief.

The petitioners' brief states on page 4 that the respondents conceded that there was no fraud practiced by the Union and rely therefor upon the respondents' concession that there was no misrepresentation. No concession, regarding fraud was ever made. Although the placard used by the Union truthfully stated a fact, it referred to the respondents as "a bakery route driver," which together with oral statements that non-union drivers were delivering merchandise to retail stores could reasonably give a person the impression that the respondents were not owners but merely non-union employees. This might be considered a species of fraud.

In discussing their conduct with respect to manufacturers and retailers, petitioners merely state that they "requested" these persons "not to deal" with the respondents. The uncontradicted testimony proves that requests were not made, but threats of picketing were

resorted to. It is important to note that we are concerned not only with the question of picketing of respondents but also picketing of manufacturers as well as threats to picket retail stores. Modern industry is so well organized today that where a picket line appears in front of a retail store, it is common knowledge that the employees of such stores usually are affected because of an almost universal rule that members of a Union will not cross the picket line of another. The continuance of a picket line in front of a retail store may cause employees in the retail stores to cease working because of their adherence to the rule not to cross a picket line. Thus; retailers might cease dealing with the respondents, not because of the language on the placard, but due to pressure other than that of free speech whereby the very life of their businesses would be threatened. The same is true of the manufacturers and the determination of this case should consider this as an important factor.

On page 5 of petitioners' brief it is stated "there is no factual justification for branding peaceful opposition to the peddler system as an 'illegal objective' and prohibiting the exercise of the privilege of free speech by opponents of that system." No such question appears in this case. Concededly, the Court of Appeals has not prohibited the petitioners herein from conducting peaceful picketing in opposition to the peddler system. The prohibition merely applies to conduct on the part of the petitioners directed against activity to foist unnecessary help upon the respondents. General conditions in the trade which were incorporated into the findings do not in any way negative the determination of the primary objective of this Union.

On page 6 reference is again made to the fact that if the Union is throttled when it seeks to raise its voice in opposition to the peddler system the number of peddlers will constantly increase as manufacturers take advantage of a cheaper method of distribution. This is not true as the petitioners are at liberty today, and have been at all times, "to raise its voice in opposition to the peddler system." The injunction in no wise has restricted any activity in this respect. The sole prohibition is that the Union may not picket the two respondents herein for the sole purpose of compelling them to hire unnecessary employees. All other activity other than this is not enjoined and the constant repetition of the peddler system evil and general condition which may apply to many peddlers will not justify or permit the imposition of illegal demands.

The reference to findings on page 7 are not connected up or deal with the respondents herein. The fact is that the Trial Court specifically refused to find that the intent and motive of the petitioners was to protest against the evils of the peddler system, but on the contrary found that their sole purpose was, in effect, to extort moneys from helpless peddlers.

Although admittedly the sole issue in this case is whether a State may prohibit picketing by a narrowly drawn injunction to prevent a Union from attempting to force the respondents herein to hire unnecessary help, the petitioners in the "Specifications of Errors to be Urged" twist and distort the real issue by attempting to fit the problem into some language used in the *Swing* case, which as will be hereinafter shown, is not in point. The statement is made that the Court of Appeals "erred in holding that an abso-

lute injunction against peaceful and orderly picketing could properly issue merely because no employment relationship existed between the members of the defendant Union and the peddlers". There is no basis for such statement. The New York Court of Appeals did not hold this to be the law. In fact, its affirmance of the Trial Court decision was clearly explained in the later case of *Opera-on-Tour* v. *Weber*. The reason for its affirmance was not because no employment relationship existed, but because the petitioners sought to coerce the respondents to hire a man one day per week. The New York Court of Appeals has not restrained picketing in other cases where no employment relationship existed between the persons picketing an establishment and an employer. In *Goldfinger* v. *Feintuch*, *supra*, the Court of Appeals recently permitted a Union to picket the establishment of a proprietor who worked alone without help where the Union was protesting against the sale of a non-union product. That Court permitted picketing as it found the purpose to be a lawful one. In another case, that of *Baillis* v. *Fuchs*, (1940) 283 N. Y. 130, the Court of Appeals of New York permitted picketing although four brothers as partners desired to conduct a business alone without help as it found under the circumstances that although the employment relationship had been completely severed by employees who went out on strike, it would not permit employers to take advantage of the doctrine enunciated in *Thompson* v. *Bockhout*, *supra*, in order to avoid the consequences of collective bargaining. The petitioners rely strongly upon the *Swing* case and state that there is no sound reason to distinguish the case at bar from that case. The important distinction is that in the *Swing* case the employer employed a number of employees who were not members of a Union. The defendant Union which was enjoined, had commenced picketing in order to unionize that employer and to force the employer to hire Union labor in the place of non-union workers. The lawfulness of such objective has been so

universally recognized that it was indeed surprising that the Supreme Court of Illinois adopted so narrow and outmoded a viewpoint. Permitting picketing for the purpose of substituting Union labor in the place of non-union labor has been recognized as a legitimate objective of labor for many many years by the Court of Appeals of New York. (See, *National Protective Association* v. *Cummings*, 170 N. Y. 315; *Exchange* v. *Rifkin, supra.*) In fact, in a very recent case the New York Court of Appeals followed its long line of decisions where the facts were identical to those in the *Swing* case. In *May's Furs and Ready to Wear* v. *Bauer*, (1940) 282 N. Y. 331, strangers who had never been employees of the plaintiff in that action picketed in order to obtain employment. Despite the fact that no employment relationship had ever existed between those picketing and the employer, the Court of Appeals reversed the Appellate Division, Second Department, and sustained the right of such persons to peacefully appeal to the public on the picket line. However, in that case, as well as the *Swing* case, the purpose sought to be accomplished by means of picketing was a lawful one, to wit, to obtain employment for members of the Union in place of workers who were non-members. In the case at bar the important distinction is that the respondents had no employees, Union or non-union, and were working alone in their own business. Here, the petitioners were not, as in the *Swing* case, seeking to obtain employment being performed by non-union workers, but they were attempting to create unnecessary employment by compelling the respondents to abstain from working in their own business. Their conduct was tantamount to extortion and had no legitimate reasonable relation to the customary activities allowed to labor Unions within the permissible area of action.

The petitioners take the position that the language of the Court of Appeals in the *Opera-on-Tour* case where the words "coerce a peddler" are used, dooms the decision

in the case at bar because the Court of Appeals has thus branded peaceful picketing as coercion. The fallacy of that argument is that the word "coerce" was used not in the sense that picketing to obliterate or remove the peddler system was coercion, or that picketing for such purpose was unlawful. That point was not at issue. The sole question was whether picketing could be used to compel these respondents to hire unnecessary help and the word "coerce" was used in the sense that peaceful means to accomplish an unlawful purpose is coercion. The Court of Appeals has never said that peaceful picketing protesting against a peddler system is illegal, despite petitioners' remarks to that effect.

Petitioners refer to the dissenting opinion of Chief Justice LEHMAN in the *Opera-on-Tour* case in an endeavor to prove that the State Court was without power to decide that the objective in this case was an unlawful one. It is significant to note that Justice LEHMAN concurred in the unanimous affirmance of this case. Borrowing language which was written because of the peculiar set of facts involved in that particular case having no application to the facts of the case at bar, is inconclusive. Furthermore, no question of picketing was involved in that case. The power of State Courts to settle written and unwritten law is well established. (See Point II.) The best answer to that contention appears in the *Meadowmoor* case where Justice FRANKFURTER said:

> "just as a state through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act, *Thornhill* v. *Alabama*, *supra*, so the law of a state may be fitted to a concrete situation through the authority given by the state to its courts."

In fact, Justice LEHMAN in his dissenting opinion in *Busch Jewelry Co.* v. *United Retail Employees Union*, 281

N. Y. 150, in reaffirming the principle of law laid down in *Exchange* v. *Rifkin*, *supra*, said:

> "The right to picket peacefully for a lawful end was not created by statute and no statute, I agree, could take away from the Supreme Court its jurisdiction to grant in proper case needed protection against unlawful abuse of the right to picket."

The cases cited by the petitioners are all not in point. All cases other than the *Swing*, *Meadowmoor* and *Lake Valley* cases dealt with broad and general statutes or injunctions with undefined threats to the inherent constitutional rights of individuals. In fact, all those cases, many of which have been discussed in this brief, noted exceptions to the general rules laid down in circumstances which jibe with the narrowly drawn limited injunction in this case.

Not having heretofore discussed the case of *Herndon* v. *Lowry*, 301 U. S. 242, it is significant to note that the Court in that case said that the State relied upon a statute unlike one which "denounced certain acts carefully and adequately described".

The statement is made that the activity in the case at bar was "similar to the activity of the Union involved" in the *Meadowmoor* and *Lake Valley Farm Products* cases. An examination of these opinions reveals that the factual set up was entirely different. There picketing was sincerely and honestly commenced for the purpose of eradicating the peddler system from the entire industry. No attempt was made to obtain unnecessary employment from individual peddlers. Any attempt to liken the activities of the petitioners in the case at bar to that of the Union in those cases, is not well taken as the evidence here unequivocally shows that the sole purpose of the picketing was to foist unnecessary help upon these employers and that the peddler system was being relied upon in defense

of the action as a pretext to escape punishment for misconduct.

In conclusion, it is advisable to point out that the respondents herein have proceeded on the theories that the injunction should be sustained on either of two theories.

(1) That the State has a right to protect the property of its residents from unjustifiable interference.

(2) That the activity prohibited was such that it was a serious and immediate evil dangerous to the best interests of the State.

Although, because of the grave problem involved herein, respondents have justified the conduct of the State Court on both of these grounds, it is submitted that it was not incumbent upon the respondents to make out so strong a case as to be able to come within the rule laid down in *Whitney* v. *California*, 274 U. S. 357. It must be remembered in that case Justice BRANDEIS expressed in greater detail the rule first stated in *Schenck* v. *United States*, 249 U. S. 247, and that the rule was founded upon restrictions of free speech emanating from interpretations of broad and unlimited statutes of the nature condemned in the *Thornhill* and *Carlson* cases. This rule of law was intended only to apply to cases of that kind and were never intended to apply to matters which the State Court could determine by individual litigation. In fact, this Court in *Gitlow* v. *New York*, *supra*, in referring to this rule which was first laid down in the *Schenck* case, said:

> "And the general statement in the *Schenck Case* (p. 52) that the 'question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils'—upon which great reliance is placed in the defendants' argument—was manifestly intended, as shown by the context, to apply only in cases of this class."

However, although this case involves individuals and an injunction narrowly drawn to cure a specific evil, the serious social and economic consequences of the conduct prohibited is such that the respondents feel that the facts of their case also come clearly within the rules of the *Whitney* case.

A refusal to sustain the wise action of the State Court will permit well organized groups to feast upon disorganized, weak and helpless individuals with the State helplessly watching its multitudes of small businessmen being drained of their small capital and income and destroyed.

CONCLUSION.

The judgment of the Court of Appeals of the State of New York should be affirmed and the appeal dismissed.

Respectfully submitted,

HYMAN WOHL,
LOUIS PLATZMAN,
Respondents in Person.

On the Brief:
JOSEPH APFEL,
ARTHUR STEINBERG.

SUPREME COURT OF THE UNITED STATES.

No. 901.—October Term, 1940.

Bakery and Pastry Drivers and Helpers Local 802 of the International Brotherhood of Teamsters, et al., Petitioners,

vs.

Hyman Wohl and Louis Platzman.

On Writ of Certiorari to the Court of Appeals of the State of New York.

[March 30, 1942.]

Mr. Justice Jackson delivered the opinion of the Court.

The petitioners are a labor union and certain of its officers. The union membership consists of truck drivers occupied in the distribution of baked goods. The respondents Wohl and Platzman are, and for some years have been, peddlers of baked goods. They buy from bakeries and sell and deliver to small retailers, and keep the difference between cost and selling price, which in the case of Wohl is approximately thirty-two dollars a week, and in the case of Platzman, about thirty-five dollars a week. Out of this each must absorb credit losses and maintain a delivery truck which he owns—but has registered in the name of his wife. Both are men of family. Neither has any employee or assistant. Both work seven days a week, Wohl putting in something over thirty-three hours a week, and Platzman about sixty-five hours a week. It was found that neither has any contract with the bakeries from whom he buys, and it does not appear that either had a contract with any customer.

The conflict between the union and these peddlers grows out of certain background facts found by the trial court and summarized here. The union has for some years been engaged in obtaining collective bargaining agreements prescribing the wages, hours, and working conditions of bakery drivers. Five years before the trial there were in New York City comparatively few peddlers or so-called independent jobbers—fifty at most, consisting largely of men who had a long-established retail trade. About four years before

the trial the social security and unemployment compensation laws, both of which imposed taxes on payrolls, became effective in the State of New York. Thereafter the number of peddlers of bakery products increased from year to year until at the time of hearing they numbered more than five hundred. In the eighteen months preceding the hearings, baking companies which operated routes through employed drivers had notified the union that at the expiration of their contracts they would no longer employ drivers but would permit the drivers to purchase trucks for nominal amounts, in some instances fifty dollars, and thereupon to continue to distribute their baked goods as peddlers. Within such period a hundred and fifty drivers who were members of the union and had previously worked under union contracts and conditions were discharged and required to leave the industry unless they undertook to act as peddlers.

The peddler system has serious disadvantages to the peddler himself. The court has found that he is not covered by workmen's compensation insurance, unemployment insurance, or by the social security system of the State and Nation. His truck is usually uninsured against public liability and property damage, and hence commonly carried in the name of his wife or other nominee. If injured while working, he usually becomes a public charge, and his family must be supported by charity or public relief.

The union became alarmed at the aggressive inroads of this kind of competition upon the employment and living standards of its members. The trial court found that if employers with union contracts are forced to adopt the "peddler" system, "the wages, hours, working conditions, six-day week, etc., attained by the union after long years of struggle will be destroyed and lost." In the spring of 1938 the union made an effort in good faith to persuade the peddlers to become members, and those who desired were admitted to membership and were only required to abide by the same constitution, by-laws, rules and regulations as were all other members. That, however, included a requirement that no union member should work more than six days per week.

These particular peddlers were asked to join the union, and each signed an application, but neither joined. The union then determined to seek an understanding with peddlers who failed to join the union that they work only six days a week and employ an unemployed union member one day in a week. The union did not in-

sist that the relief man be paid beyond the time that he actually worked, but asked that he be paid on the basis of the union's daily wage, which fixed a scale for part of a day if but part of a day was required for the service of the route. For some ten weeks Wohl employed a relief driver, who was paid $6.00 per day, the normal day's wage for a full day being $9.00.

When Wohl and Platzman finally refused either to join the union or to employ a union relief man, and continued to work seven days each week, the union took the measures which led to this litigation. On the twenty-third of January, 1939, the union caused two pickets to walk in the vicinity of the bakery which sold products to Wohl and Platzman, each picket carrying a placard, one bearing the name of Wohl and the other that of Platzman, and under each name appeared the following statement: "A bakery route driver works seven days a week. We ask employment for a union relief man for one day. Help us spread employment and maintain a union wage, hours and conditions. Bakery and Pastry Drivers and Helpers Local 802, I. B. of T. Affiliated with A. F. L." The picketing on that day lasted less than two hours. Again, on the twenty-fifth of January, the union caused two pickets to display the same placards in the same vicinity for less than an hour; and on the same day a picket with a placard bearing the name of Wohl over the same statement, picketed for a very short time in the vicinity of another bakery from which Wohl had purchased baked products. It was also found that a member of the union followed Platzman as he was distributing his products and called on two or three of his customers, advising them that the union was seeking to persuade Platzman to work but six days per week and employ a union driver as a relief man, and stating to one that in the event he continued to purchase from Platzman a picket would be placed in the vicinity on the following day with a placard reading as set forth above. It does not appear that this threat was carried out.

The trial court found that the placards were truthful and accurate in all respects; that the picketing consisted of no more than two pickets at any one time and was done in a peaceful and orderly manner, without violence or threat thereof; that it created no disorder; that it was not proved that any customers turned away from such bakeries by reason of the picketing; and it was not established that the respondents sustained any monetary loss by reason thereof.

The trial court issued injunctions which restrained the union and its officers and agents from picketing either the places of business of manufacturing bakers who sell to the respondents or the places of business of their customers. 14 N. Y. Supp. 2d 198. The judgment was affirmed without opinion by the Appellate Division of the First Department, two Justices thereof dissenting with opinion, 259 A. D. 868; and was affirmed without opinion by the Court of Appeals, 284 N. Y. 788. This Court denied a petition for a writ of certiorari because it did not appear that the federal question presented by the petition had necessarily been decided by the Court of Appeals. 313 U. S. 572. The Court of Appeals later certified that such question had been passed upon, a petition for rehearing was granted, the writ of certiorari granted, and the judgment summarily reversed. 313 U. S. 548. We later granted another petition for rehearing, and have since heard argument. 314 U. S. —.

The controversy in the trial court centered about the issue as to whether a labor dispute was involved within the meaning of New York statutes. The trial court found itself constrained to hold that no labor dispute was involved and seemed to be of the impression that therefore no Constitutional rights were involved. It concluded as a matter of law that the respondents "are the sole persons required to run their business and therefore they are not subject to picketing by a union or by the defendants who seek to compel them to employ union labor." The trial court refused the petitioners' request for a finding that "it was lawful for the defendants to truthfully advise the public of its cause, whether in the vicinity of the places of business of bakers who sold to the plaintiffs, or otherwise." Likewise, it refused a request to find "that it was a constitutional right of the defendants to advise the public accurately and truthfully and without violence or breach of the peace, that defendants worked seven days a week and that the defendants were seeking to secure employment from the plaintiffs for unemployed members of the union one day a week."

So far as we can ascertain from the opinions delivered by the state courts in this case, those courts were concerned only with the question whether there was involved a labor dispute within the meaning of the New York statutes and assumed that the legality of the injunction followed from a determination that such a dispute was not involved. Of course that does not follow: one need not be in a "labor dispute" as defined by state law to have a right under

the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive.

The respondents say that the basis of the decision below was revealed in a subsequent opinion of the Court of Appeals, where it was said with regard to the present case that "we held that it was an unlawful labor objective to attempt to coerce a peddler employing no employees in his business and making approximately thirty-two dollars a week, to hire an employee at nine dollars a day for one day a week." *Opera-on-Tour* v. *Weber*, 285 N. Y. 348, 357, certiorari denied, 314 U. S. —. But this lacks the deliberateness and formality of a certification,[1] and was uttered in a case where the question of the existence of a right to free speech under the Fourteenth Amendment was neither raised nor considered.

We ourselves can perceive no substantive evil of such magnitude as to mark a limit to the right of free speech which the petitioners sought to exercise. The record in this case does not contain the slightest suggestion of embarrassment in the task of governance; there are no findings and no circumstances from which we can draw the inference that the publication was attended or likely to be attended by violence, force or coercion, or conduct otherwise unlawful or oppressive; and it is not indicated that there was an actual or threatened abuse of the right to free speech through the use of excessive picketing. A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual. But so far as we can tell, respondents' mobility and their insulation from the public as middlemen made it practically impossible for petitioners to make known their legitimate grievances to the public whose patronage was sustaining the peddler system except by the means here employed and contemplated; and those means are such as to have slight, if any, repercussions upon the interests of strangers to the issue.

The decision of the Court of Appeals must accordingly be

Reversed.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

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[1] Compare Ex parte Texas, 314 U. S. —.

SUPREME COURT OF THE UNITED STATES.

No. 901.—October Term, 1940.

Bakery and Pastry Drivers and Helpers Local 802 of the International Brotherhood of Teamsters, et al., Petitioners, *vs.* Hyman Wohl and Louis Platzman.

On Writ of Certiorari to the Court of Appeals of the State of New York.

[March 30, 1942.]

Mr. Justice Douglas, concurring.

If the opinion in this case means that a State can prohibit picketing when it is effective but may not prohibit it when it is ineffective, then I think we have made a basic departure from *Thornhill* v. *Alabama*, 310 U. S. 88. We held in that case that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." p. 102. While we recognized that picketing could be regulated, we stated (p. 104-105): "Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion." And we added (p. 105): "But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor disute involving the latter." For that reason we invoked the test, employed in comparable situations (*Cantwell* v. *Connecticut*, 310 U. S. 296, 307; *Bridges* v. *California*, 314 U. S. —) that the statute which is the source of the restriction on free speech must be "narrowly drawn to cover the precise situation giving rise to the danger." p. 105.

We recognized that picketing might have a coercive effect: "It may be that effective exercise of the means of advancing public

knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society." p. 104.

Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.

But since "dissemination of information concerning the facts of a labor dispute" is constitutionally protected, a State is not free to define "labor dispute" so narrowly as to accomplish indirectly what it may not accomplish directly. That seems to me to be what New York has done here. Its statute (Civil Practice Act, § 876a) as construed and applied in effect eliminates communication of ideas through peaceful picketing in connection with a labor controversy arising out of the business of a certain class of retail bakers. But the statute is not a regulation of picketing *per se*—narrowly drawn, of general application, and regulating the use of the streets by all picketeers. In substance it merely sets apart a particular enterprise and frees it from all picketing. If the principles of the *Thornhill* case are to survive, I do not see how New York can be allowed to draw that line.

Mr. Justice BLACK and Mr. Justice MURPHY join in this opinion.